71-1236

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IN THE

Supreme Court, U. S.
FILED
MAR 28 1972
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

NO._____

RESPONSE NOT PRINTED

STATE OF ALABAMA,

PETITIONER

vs.

MICHAEL GARY RENNOW, Alias
GARY RENNOW,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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IN THE

Supreme Court of the United States

NO._____

STATE OF ALABAMA,

PETITIONER

vs.

MICHAEL GARY RENNOW, Alias
GARY RENNOW,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, State of Alabama, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court to review the judgment of the Court of Criminal Appeals of the State of Alabama rendered on the 5th day of October, 1971, which affirmed the conviction of the Respondent by a jury in the Circuit Court of Etowah County, Alabama, for the crime of rape.

An Application For Rehearing in the Court of Criminal Appeals of the State of Alabama was denied on November 2, 1971.

A Petition For Writ of Certiorari in the Supreme Court of the State of Alabama was denied on December 2, 1971.

An Application For Rehearing in the Supreme Court of the State of Alabama on its denial of the Petition For Writ of Certiorari was denied on December 30, 1971.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of the State of Alabama is reported in 255 Southern Reporter, 2nd Series, p. 602, et seq., is set forth in Appendix A, *infra*, at pp. 19-21, and is also contained in the record on that appeal, which is submitted herewith in support of the instant petition.

The Court of Criminal Appeals of the State of Alabama rendered no opinion in its order overruling the Application For Rehearing.

The Supreme Court of the State of Alabama rendered no opinion in its order denying the Petition For Writ of Certiorari to the Court of Criminal Appeals of the State of Alabama. The judgment of the Supreme Court of Alabama is reported at 255 Southern Reporter, 2nd Series, p. 604.

The Supreme Court of the State of Alabama rendered no opinion in its order denying the Application For Rehearing on the order denying the Petition For Writ of Certiorari to the Court of Criminal Appeals of the State of Alabama.

JURISDICTION

Jurisdiction to review this case upon Writ of Certiorari is conferred upon this Court by Title 28, United

States Code, Section 1257(3), in that (a) the validity of a state statute is drawn in question on the ground of its being repugnant to federal law and (b) a right set up and claimed under the Constitution of the United States is drawn into question.

QUESTIONS PRESENTED

(1) Is Title 13, Section 229(3), Code of Alabama 1940, Recompiled 1958, authorizing the issuance of arrest warrants by Alabama district attorneys, unconstitutional as measured by the Fourth and Fourteenth Amendments, constitution of the United States, in light of the teachings of this Court enunciated in *Coolidge v. New Hampshire*, ... U.S. ....., 29 L. ed.2d 564, 91 S. Ct. 2022; *Mancusi v. De Forte*, 392 U.S. 364; and *Johnson v. United States*, 333 U.S. 10?

The pertinent Alabama statute is set out in Appendix B, *infra*, at p 22.

(2) Is Section 1601(129-145), Appendix, Code of Alabama 1940, Recompiled 1958, insofar as it permits a city police officer to be appointed a City Magistrate authorized to issue arrest warrants, unconstitutional as measured by the Fourth and Fourteenth Amendments, Constitution of the United States, in light of the teachings of this Court enunciated in *Coolidge v. New Hampshire*, ...U.S....., 29 L. ed.2d 564, 91 S. Ct. 2022; *Mancusi v. De Forte*, 392 U.S. 364; and *Johnson v. United States*, 333 U.S. 10?

The pertinent Alabama statute is set out in Appendix B, *infra*, at pp. 22-27.

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provisions are:

A. That part of the Fourteenth Amendment, Constitution of the United States, Section 1, which states:

> "*** nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

B. The Fourth Amendment, Constitution of the United States, which reads as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

An indictment was returned against the Respondent, Michael Gary Rennow, by the Grand Jury of Etowah County, Alabama on October 2, 1970 for the offense of rape. Rennow having interposed a plea of not guilty to the indictment, trial was had in this cause beginning on November 9, 1970 in the Circuit Court of Etowah County, Alabama. At the conclusion of the evidence the case was submitted to the jury under the indictment whereupon the jury returned a verdict finding Rennow guilty as charged on November 10, 1970. That same day a judgment was rendered in accordance with the verdict sentencing Rennow to imprisonment in the Alabama state penitentiary for a period of twenty years. That same day Rennow gave notice of appeal in open court.

The sole issue raised on appeal in the Court of Criminal Appeals of Alabama by the Respondent Rennow concerned

the propriety of the ruling of the trial court in admitting into evidence a knife used by Rennow in the commission of the rape of the prosecutrix, Mrs. Barbara Bryant. Accordingly, this statement deals only with those facts leading up to and relating to the arrest of Rennow and the seizure of his knife as an incident to the said arrest.

After Mrs. Bryant was raped in Gadsden, Alabama on March 22, 1970, she positively identified Rennow as her assailant from a number of mug shots of other men. She then, on May 27, 1970, swore out an affidavit for the arrest of Rennow before W. W. Rayburn, District Attorney of Etowah County, Alabama. District Attorney Rayburn issued an arrest warrant for Rennow on May 27, 1970 based upon Mrs. Bryant's affidavit.

On May 28, 1970, Etowah County, Alabama Investigator, L. P. Payne, and J. D. Longshore, Assistant Chief of Police of Gadsden, Alabama, accompanied by a Deputy Sheriff of Jefferson County, Alabama, arrested Rennow in a Birmingham, Alabama hospital in a doctor's office under the authorization of the arrest warrant issued by Etowah County, Alabama District Attorney Rayburn.

The officers and Rennow then went upstairs to a room in the hospital which had been assigned to Rennow as a patient, where Rennow was instructed by the officers to dress for the return trip to Gadsden, Alabama. Rennow's trousers were lying over a traveling bag approximately two and one-half feet away from Rennow. In the process of dressing, Rennow reached into the bag and took out some undergarments, whereupon one of the officers conducted a search of the bag producing, among other things, the knife which was later introduced through Mrs. Bryant's testimony

as being the one used by Rennow to intimidate her while he raped her.

On October 5, 1971 the Court of Criminal Appeals of Alabama affirmed the judgment of conviction appealed from the Circuit Court of Etowah County, Alabama.

On November 2, 1971, the Court of Criminal Appeals of Alabama denied an Application For Rehearing filed in that Court by the Petitioner.

On December 2, 1971, the Supreme Court of Alabama denied the Petitioner's Petition For Writ of Certiorari to the Court of Criminal Appeals of Alabama seeking to revise the judgment of that Court.

On December 30, 1971, the Supreme Court of Alabama overruled the Petitioner's Application For Rehearing on the denial of the certiorari petition.

REASONS FOR GRANTING THE WRIT

Since 1951 prosecuting attorneys in Alabama have been issuing arrest warrants upon proper affidavit and showing of probable cause. Title 13, Section 229(3), Code of Alabama 1940, as amended. (Appendix B, infra, p. 22.) This statute has provided a workable system under which district attorneys and other solicitors in Alabama perform the complex task of law enforcement. Language contained in the decision of the Court of Criminal Appeals of Alabama below, if allowed to go unchallenged, would interrupt that orderly flow of work without any increased benefits to prospective defendants in Alabama. The pertinent language contained in the opinion is as follows:

"*Coolidge v. New Hampshire,* .....U.S.....; and *Mancusi v. De Forte,* 392 U.S. 364, both relying on *Johnson v. United States,* 333 U.S. 10, have in effect held that warrants issued by prosecuting attorneys are infirm because the inferences from the facts leading to the complaint are not drawn by a neutral and detached magistrate.

"It necessarily follows that statutes such as Act 130 of June 26, 1951, [Michie's 1958 Code, T. 13, §229(3)] must be considered as unconstitutional.[1]

* * *

"[1] §4 of Act No. 100, Aug. 24, 1964, insofar as it permits a police officer to be appointed City Magistrate is probably invalid under Coolidge v. New Hampshire, ___U.S.___, unless the appointment of a police officer terminates the appointee's association with 'ferreting out crime.' §16 of that Act would not appear to be sufficient to accomplish the required detachment. The Court of Appeals noted the problem in **Miller v. City of Birmingham,** 44 Ala. App. 628, 218 So.2d 281." [Emphasis theirs.]

Appendix A, pp. 20-21.

The State of Alabama submits that a review of this case by this Honorable Court is absolutely necessary to serve the ends of justice. It is assumed by the State of Alabama that the language of the Court of Criminal Appeals of Alabama set out above constitutes dicta. But is this assumption correct? We cannot know. The District Attorney in Choctaw County, Alabama cannot know. Has an Alabama statute which has stood for twenty years been stricken by the Court of Criminal Appeals of Alabama, or has the Court of Criminal Appeals of Alabama merely stated that the statute will be stricken at some future time if the issue of its constitutionality is properly presented in that Court? If Section 229(3) of the Code of Alabama, supra, is now un-

constitutional, is such ruling retroactive to arrest warrants issued by Alabama district attorneys prior to tne date of the decision of the Court of Criminal Appeals of Alabama, or is the ruling to be given prospective application only? Must the Alabama Attorney General advise all affected municipal governing bodies in Alabama that, by virtue of what is contained in footnote 1 of the Court of Criminal Appeals decision, Section 4 of Act No. 100, Acts of Alabama 1964, supra, is unconstitutional and city police officers in Alabama cannot serve as City Magistrates? Law enforcement officials in Alabama are at loss as to where they stand in the area of arrest procedures in view of the language handed down by the Court of Criminal Appeals of Alabama.

This Honorable Court is earnestly urged by the State of Alabama to grant the Petition For Writ of Certiorari and to furnish the law enforcement officers of Alabama with a clarification of the extant law on the issuance of arrest warrants and with guidelines establishing the constitutional bounds within which Alabama officers may now function in the issuance of arrest warrants.

There are at least five compelling reasons why the Supreme Court should grant certiorari in this case and instruct the state court below to strike and withdraw from its opinion the above-quoted portions of its opinion.

1.

Constitutional Requirements Differ Between Search And Arrest Procedures.

Coolidge v. New Hampshire, ...U.S....., 29 L. ed.2d 564, 91 S. Ct. 2022, and other cases cited by the Court of Criminal Appeals of Alabama in support of its determina-

tion of the unconstitutionality of the Alabama statute in question involve application of constitutional standards to the issuance of search warrants as opposed to arrest warrants. Constitutional safeguards which govern searches and arrests are both found in the Fourth Amendment to the United States Constitution. However, this Court has traditionally allowed greater latitude in making arrests than in making searches. For example, a police officer may make an arrest on probable cause without a warrant. *Beck v. Ohio*, 379 U.S. 89, 13 L. ed.2d 142, 85 S. Ct. 223. On the other hand, a search without a warrant is per se unconstitutional. *Coolidge v. New Hampshire*, supra. Therefore, no search can be made without a warrant however great the probable cause, unless the state can prove the search is within three narrowly defined exceptions: consent, search incident to legal arrest, or an emergency (moving vehicles, etc.). In refusing to allow a search upon probable cause but without a warrant, this Court in the leading case of *Agnello v. United States* stated that "the search of a private dwelling without a warrant, is, in itself, unreasonable and abhorrent to our laws." 269 U.S. 20, 70 L. Ed. 145, 46 S. Ct. 4. Continuing, the Court added:

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

70 L. Ed. at p. 149.

Invasion of the person is allowed upon probable cause without a warrant, but to invade a private dwelling a warrant is necessary. A private citizen can be arrested on probable

cause alone, but his house cannot be invaded without issuance of a search warrant, however great the probable cause. Constitutional guarantees for searches and arrests, though controlled by the same constitutional amendment, are judged by different constitutional tests. The right against invasion of the person is not as strenuously protected as the right against invasion of the sanctity of the home.

2.

Police Officers Can Make An Arrest Without a Warrant Upon Showing Of Probable Cause.

A police officer can make an arrest without first obtaining a warrant. The test as to whether the arrest without a warrant is constitutionally valid depends upon whether at the moment of arrest the facts and circumstances within his knowledge and of which he had reasonable trustworthy information were sufficient to warrant a prudent man in believing that a suspect had committed an offense. *Beck v. Ohio,* supra; *Henry v. United States,* 361 U.S. 98, 4 L. ed.2d 134, 80 S. Ct. 169. Certainly the police officer who apprehends a criminal is not neutral and detached. He is generally actively participating in ferreting out crime and apprehending the suspect. Yet, he is allowed to make an arrest without a warrant based upon probable cause. To declare that a district attorney could not issue a constitutionally valid arrest warrant is to make a mockery of the need for that warrant. The police officer is not a public official. He has, nevertheless, been empowered by legislative act to determine probable cause to make a warrantless arrest. It is sheer folly to allow a policeman to make an independent determination of the facts as to probable cause and make an arrest but refuse to grant this authority to a district attorney

who is learned in the law and far better trained to arrive at an appropriate independent determination upon the presentation of a federal constitutional question.

3.

Alabama District Attorneys Are Magistrates.

Under authority of Title 13, Section 229(3), Code of Alabama 1940, as amended, Alabama district attorneys have issued arrest warrants for over twenty years. The Alabama Court of Appeals has upheld the validity of this act. *Holloman v. State*, 37 Ala. App. 599, 74 So.2d 612, Cert. denied, 261 Ala. 698, 74 So.2d 614. In *Holloman v. State*, supra, the appellant contended that the arrest warrant in question was void because it was executed before an Alabama county solicitor. The Court of Appeals of Alabama denied the appellant's contention and held that it was a valid exercise of legislative authority to commit warrant issuing functions to the county solicitor.

Alabama district attorneys have been defined as magistrates under Alabama law by other state courts. On appeal of extradition proceedings to the Kentucky Court of Appeals in *Ex parte Noel*, 338 S.W.2d 903, the appellant contended that under the pertinent extradition statute an affidavit was required to be made before a magistrate. Since the affidavit in question was made before an Alabama circuit solicitor, the appellant claimed the warrant was void. The Kentucky Court rejected this contention and held that the term "magistrate" included a circuit solicitor. The Court added:

> "Appellant's argument is apparently based on the idea that the word, magistrate, is confined in its

> meaning to the one officer we designate in this state as magistrate. The word, magistrate, in its generic sense is defined as a person clothed with power as a public civil officer, or a public civil officer invested with executive or judicial power. It seems certain that in Alabama the circuit solicitor is empowered to administer oaths and issue warrants in all civil cases and is a person who may be classified as a magistrate under the act."
>
> *Ex parte Noel,* (Ky. 1960), 338 S. W.2d 903.

A similar result was reached in the case of *State v. Pecor,* 260 A.2d 736 (Vt. 1969).

The term "magistrate" when used in describing a person capable of issuing a warrant of arrest has been broadly defined by the United States Supreme Court:

> "In a general sense a magistrate is a public civil officer, possessing such power — legislative, executive, or judicial — as the government appointing him may ordain. In a narrow sense, a magistrate is regarded — perhaps, commonly regarded — as an inferior judicial officer, such as a justice of the peace. . . . But the appelation of magistrate 'is not confined to justices of the peace, and other persons, *ejusdem generis,* who exercise general judicial powers; but it includes others whose duties are strictly executive.' ***"
>
> *J. D. Compton v. State of Alabama,* 214 U.S. 1, 29 S. Ct. 605, 53 L. Ed. 885, 887.

In this connection, also see the recent state decision of *Shadwick v. City of Tampa,* .....Fla....., 250 So.2d 4.

This Court has permitted states to develop workable rules governing arrests to meet practical demands of effective criminal investigation not inconsistent with the Fourth Amendment to the United States Constitution. *Ker v. California*, 374 U.S. 323, 10 L. ed.2d 726, 83 S. Ct. 1623. Alabama has done this through Title 13, Section 229(3), Code of Alabama 1940, as amended. A district attorney who is trained in the law is an asset in assisting a police officer in determining whether there is probable cause to make an arrest. His refusal to issue a warrant, based upon his legal training and experience, can prevent needless and unfounded arrests. No construction or definitions rendered by this Court have excluded a state district attorney from the term "magistrate" as applied to the issuance of arrest warrants.

4.

Any Decision At This Point By A State Court That This Court Would Prohibit District Attorneys From Issuing Arrest Warrants Is Merely Speculative.

Although it is settled law that the issuance of *search* warrants by state district attorneys is forbidden, it is entirely probable that this Court, when properly presented with the question, will hold that a state district attorney is a qualified magistrate for the purposes of issuing arrest warrants. There is certainly no justifiable basis for a foredrawn conclusion that this Court will rule otherwise. The landmark search warrant case itself, *Coolidge v. New Hampshire*, supra, was decided by a five/four vote. Mr. Chief Justice Burger dissented and said:

> "On the merits of the case I find not the slightest basis in the record to reverse this conviction. Here again the Court reaches out, strains and distorts

rules which were showing some signs of stabilizing, and directs a new trial which will be held more than seven years after the criminal acts charged."

Coolidge v. New Hampshire, 29 L. ed.2d at p. 598.

In that same case, Mr. Justice Black concurring and dissenting in part, said:

"In the first place, there is no language in the Fourth Amendment which provides any basis for the disqualification of the state attorney general to act as a magistrate. He is a state official of high office elected by the people. The Fourth Amendment does not indicate that his position of authority over state law enforcement renders him ineligible to issue warrants upon a showing of probable cause supported by oath or affirmation. The majority's argument proceeds on the 'little trial' theory that the magistrate is to sit as a judge and weigh the evidence and practically determine guilt or innocence before issuing a warrant. There is nothing in the Fourth Amendment to support such a magnified view of the magistrate's authority. The state attorney general was not barred by the Fourth Amendment or any other constitutional provision from issuing the warrant."

29 L. ed.2d at p. 603.

It can readily be seen, therefore, that this Court is bitterly split as to who qualifies constitutionally as a proper magistrate to issue a search warrant. Because of this disagreement and because of the separate development of constitutional safeguards in the fields of arrests and searches, there is considerable doubt as to who a duly constituted

court at some future date might decide is the proper person to issue an arrest warrant.

It is submitted that the countervailing considerations outweighing the type of anticipatory declaration of unconstitutionality engaged in by the Court of Criminal Appeals of Alabama in its opinion below are overwhelming. The question now before this Court is not whether the State of Alabama can predict that this Court will uphold the constitutionality of the Alabama statutes in question, but rather should the Court of Criminal Appeals of Alabama at this stage be allowed to speculate that the statutes would be declared unconstitutional by this Court if the issue were properly raised.

5.

The Language Of The Court Of Criminal Appeals Of Alabama Which Questions The Constitutional Validity Of Arrest Warrants Issued By District Attorneys And Police Magistrates Creates Confusion And Uncertainty In The Field of Law Enforcement.

The language quoted from the opinion of the Court of Criminal Appeals of Alabama was wholly unnecessary for a decision in the case presented to that Court, and it must be classified as dicta. It is not certain whether the Court of Criminal Appeals of Alabama is declaring the Alabama statutes unconstitutional and void, or is merely thinking aloud as to the probable result should the issue be properly raised and adequately briefed. The confusion is compounded when the Court of Criminal Appeals fails to mention *Holloman v. State*, supra, an earlier decision of that Court which had upheld the validity of the statute involving district attorneys.

Should Alabama district attorneys treat the statute in question as invalid and refuse to issue arrest warrants? Alabama law enforcement officials are seriously attempting to educate themselves as to proper procedures for enforcing the law. Appellate decisions which suggest the unconstitutionality of a statute under which officials have worked smoothly for twenty years add confusion to their efforts to obtain a workable knowledge of procedural rules.

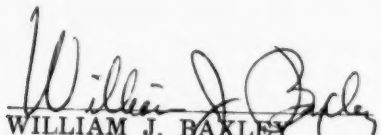
CONCLUSION

It is to this state of uncertainty that this writ addresses itself. Although denial of Certiorari does not mean approval or disapproval of the language of the Court of Criminal Appeals of Alabama, such denial increases the uncertainty and confusion in the administration of justice. The question is of paramount importance to law enforcement officials in Alabama as well as to an ever increasingly skeptical society. This Court has not declared arrest warrants invalid which have been issued by state prosecutors. Speculation as to any future decision by this Court tends merely to confuse the existing law to further erode the wall of confidence once held by the American people in its judicial process.

The State of Alabama respectfully urges this Honorable Court to review the opinion of the Court of Criminal Appeals of Alabama rendered below in the cause *sub judice*, and to remand this cause to the Court of Criminal Appeals of Alabama with instructions directing that Court to set aside and withdraw such portions of its decision as may be construed as a declaration of the unconstitutionality of Title 13, Section 229(3), Code of Alabama 1940, Recompiled 1958, and a determination of the probable unconstitutionality of Section 4 of Act No. 100, Acts of Alabama 1964, codified as

Section 1601(129-145), Appendix, Code of Alabama 1940, Recompiled 1958.

Respectfully submitted,



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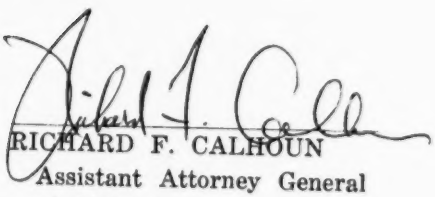

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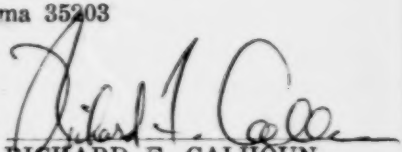
CERTIFICATE OF SERVICE

I, Richard F. Calhoun, one of the Attorneys For Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of MARCH, 1972, I served copies of the foregoing Petition For Writ of Certiorari on the law firm of Parker, Wilkinson, Montgomery and Gwin, by mailing said copies in a duly addressed envelope to said attorneys of record, as follows:

Parker, Wilkinson, Montgomery and Gwin
Attorneys at Law
210 Frank Nelson Building
Birmingham, Alabama 35203



RICHARD F. CALHOUN
Assistant Attorney General
of Alabama

APPENDIX "A"

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1971-72

7 Div. 96

Michael Gary Rennow, Alias

v.

State

Appeal from Etowah Circuit Court

CATES, JUDGE

Rape: sentence, twenty years in the penitentiary.

I

Rennow's victim picked his photograph from those of a number of other men. See *Simmons v. United States*, 390 U.S. 377. She then swore out an affidavit before the District Attorney who thereupon issued a warrant for Rennow's arrest.

On May 28, 1970, Gadsden's Assistant Chief of Police, J. D. Longshore, armed with this warrant of arrest went to a hospital in Birmingham and finding Rennow, arrested him in a doctor's office. The officer and Rennow went upstairs to a room which had been assigned to Rennow.

There Rennow was told to change from his hospital garb to street clothes so that he would be suitably attired for the trip to Gadsden.

Rennow's trousers were lying over a traveling bag. Rennow reached into the bag and took out an undergarment.

At this point Longshore stopped Rennow's going into the bag. A search by the officer produced, among other things, the knife which was later introduced in evidence through the victim's testimony — over objection — as being the one used by Rennow to intimidate her while he ravished her. (State's Exh. 2, R. 49).

Rennow was about two and a half feet from the bag. Hence, no problem arises under *Chimel v. California*, 395 U.S. 752, since demonstrably the bag was within the area of Rennow's "immediate control."

II

A more serious question is presented by the arrest warrant's having been issued by the District Attorney, the chief prosecuting lawyer for the State within his judicial circuit, in this instance Etowah County.

Coolidge v. New Hampshire, ...U.S.....; and *Mancusi v. De Forte*, 392 U.S. 364, both relying on *Johnson v. United States*, 333 U.S. 10, have in effect held that warrants issued by prosecuting attorneys are infirm because the inferences from the facts leading to the complaint are not drawn by a neutral and detached magistrate.

It necessarily follows that statutes such as Act 130 of June 26, 1951, [Michie's 1958 Code, T. 13, § 229(3)] must be considered as unconstitutional.[1]

III

Though the writ of arrest was wrongly issued it does not follow that the arrest was invalid.

Longshore attended a meeting in the Sheriff's office at which the victim was shown a number of mug shots and

from which she picked one of Rennow. Also he knew of the victim's having made complaint of rape, particularly in a formal affidavit which was attached to the District Attorney's invalid warrant for Rennow's arrest.

We consider, as did the trial judge, that the requisites for a felony arrest without a warrant were met. Any citizen may arrest for a felony. Therefrom flowed the right of the arresting officer to make a search within the limits laid down in *Chimel*, supra.

We have searched the record under Code 1940, T. 15, § 389, and consider that the judgment below is due to be

AFFIRMED.

---

[1] § 4 of Act No. 100, Aug. 24, 1964, insofar as it permits a police officer to be appointed City Magistrate is probably invalid under **Coolidge v. New Hampshire**, ____U.S.____, unless the appointment of a police officer terminates the appointee's association with "ferreting out crime." § 16 of that Act would not appear to be sufficient to accomplish the required detachment. The Court of Appeals noted the problem in **Miller v. City of Birmingham**, 44 Ala. App. 628, 218 So.2d 281.

APPENDIX "B"

Title 13, Section 229(3), Code of Alabama 1940, Recompiled 1958

§ *229(3). Power to take oaths in support of complaints and issue warrants.*—Every circuit solicitor, deputy circuit solicitor, assistant deputy circuit solicitor, county or other solicitor by whatever name called within the circuit, county or other territory for which he is elected or appointed shall have the power to take oaths in support of complaints and to issue warrants in all criminal cases, provided, that such warrants shall be made returnable to a court having original jurisdiction of the offense charged.

Provided that this section shall not apply to counties which comprise one entire circuit with more than two and less than five circuit judges. (1951, p. 357, appvd. June 26, 1951.)

Appendix, Section 1601 (129-145), Code of Alabama 1940, Recompiled 1958

City Magistrates.

§ *1601(129). Creation of office.*—The city council or other governing body of any city which may now or hereafter have a population of three hundred thousand (300,000) inhabitants or more, according to the last or any subsequent federal census, may by ordinance create the office of city magistrate and provide for the appointment of city magistrates to perform those functions and exercise the powers and authority specified herein. (1964, 1st Ex .Sess., No. 100, § 1, appvd. Aug. 24, 1964.)

§ *1601(130). Appointment: tenure of office.*—City magistrates shall be appointed by resolution of the said govern-

ing body and shall serve at the will or pleasure of said governing body. (1964, 1st Ex. Sess., No. 100, § 2, appvd. Aug. 24, 1964.)

§ *1601(131). Same; number; location.*—Said governing body may appoint as many city magistrates as it deems necessary, and they may be appointed either for specified precincts or other political subdivisions of the city or for the city at large. (1964, 1st Ex. Sess., No. 100, § 3, appvd. Aug. 24, 1964.)

§ *1601(132). Same; qualifications.*—No person shall be appointed a city magistrate unless he be over the age of 25, a resident of the city for two or more years, of good moral character and have a high school education or its equivalent, except that any police officer with ten years service on the police force of the city and present rank of at least lieutenant shall be deemed eligible for said appointment. (1964, 1st Ex. Sess., No. 100, § 4, appvd. Aug. 24, 1964.)

§ *1601(133). Duty to issue search warrants and writs of arrest.*—It shall be the duty and function of city magistrates to issue search warrants and writes [writs] or arrest in accordance with the provisions contained herein. (1964, 1st Ex. Sess., No. 100, § 5, appvd. Aug. 24, 1964.)

§ *1601(134). Search warrants; grounds for issuance.*—The grounds for the issuance of search warrants shall be as follows: (a) Where the property was stolen or embezzled; (b) where the property was used as the means of committing a felony; (c) where the property is in the possession of any person with the intent to use it as a means of committing a public offense, contrary to the laws of the state or city; or (d) where the property is in the possession of another to whom it may have been delivered for the purpose of concealing

it or preventing its discovery; or (e) where the issuance of a search warrant is authorized under the provisions of any law of this state. (1964, 1st Ex. Sess., No. 100, § 6, appvd. Aug. 24, 1964.)

§ *1601 (135). Same; to be issued only on probable cause.* —A search warrant can only be issued on probable cause, supported by affidavit, naming or describing the person and particularly describing the property, and the place to be searched. (1964, 1st Ex. Sess., No. 100, § 7, appvd. Aug. 24, 1964.)

§ *1601(136). Same; when magistrate to issue warrant.*— If the magistrate is satisfied of the existence of reasonable grounds for the issuance of the warrant, or that there is probable ground to believe their existence, he must issue a search warrant signed by him directed to any police officer of the city, except as otherwise provided in this subdivision, commanding him forthwith to search the person or place named in said search warrant for the property or cause specified, and to make proper return on said writ to a recorder authorized to hold court in said city or to the judge of any court of record in said city, wherein the prosecution to which such search warrant relates is pending. (1964, 1st Ex. Sess., No. 100, § 8, appvd. Aug. 24, 1964.)

§ *1601(137). Same; by whom executed.*—A search warrant may be executed by any one of the police officers of the city to whom it is directed, but by no other person, except in aid of such officer, at his request he is being present and acting in its execution. (1964, 1st Ex. Sess., No. 100, § 9, appvd. Aug. 24, 1964.)

§ *1601(138). Same; to be executed within ten days.*— The search warrant must be executed and returned within

ten days after its date, and after that time, of not executed, it is void. (1964, 1st Ex. Sess., No. 100, § 10, appvd. Aug. 24, 1964.)

§ *1601(139). Effect on other state law.*—Nothing contained in this subdivision shall be so construed as to repeal, limit or otherwise restrict section 486, Title 37, 1940 Code of Alabama, or any other acts which confer broader or additional powers on said city to issue search warrants, and such city magistrates are hereby authorized to issue search warrants pursuant to said section 486 and any other acts which confer said power on the city. (1964, 1st Ex. Sess., No. 100, § 11, appvd. Aug. 24, 1964.)

§ *1601(140). Writs of arrest; complaint; examination of complainant and witnesses; depositions.*—A writ of arrest can be issued by a city magistrate only upon a complaint being made before such magistrate that an offense has in the opinion of the complainant, been committed, and the magistrate must examine the complainant, and such witnesses as complainant may propose, on oath, take their depositions in writing, and cause them to be subscribed by the person making them. (1964, 1st Ex. Sess., No. 100, § 12, appvd. Aug. 24, 1964.)

§ *1601(141). Same; requirements of depositions.*—The depositions must set forth the facts stated by the complainant and his witnesses, tending to establish the commission of the offense and the guilt of the defendant. (1964, 1st Ex. Sess., No. 100, § 13, appvd. Aug. 24, 1964.)

§ *1601(142). Same; when magistrate to issue warrant.*—If the magistrate is reasonably satisfied from such deposition that the offense complained of has been committed, and that there is reasonable ground to believe that the defendant is

guilty thereof, he must issue a warrant of arrest. (1964, 1st Ex. Sess., No. 100, § 14, appvd. Aug. 24, 1964.)

§ *1601(143). Same; form.*—The following form shall be deemed sufficient for a warrant of arrest:

THE STATE OF ALABAMA)
CITY OF .....)

TO ANY POLICEMAN OF THE CITY OF .....

Complaint on oath having been made before me that the offense of (designating and describing it) has been committed, and accusing C.D. thereof, you are hereby commanded forthwith to arrest C.D. and bring him before a recorder authorized to hold court to answer the city of ..... of a charge of (describe the offense), in violation of the ordinance or law of said city in such case made and provided.

Dated the ..... day of ....., 19.....

(Signed) G. H.
City Magistrate
City of .....

(1964, 1st Ex. Sess., No. 100, § 15, appvd. Aug. 24, 1964.)

§ *1601(144). When magistrate may not issue search warrant or writ of arrest.*—No magistrate, who is also a police officer, shall issue any search warrant or writ of arrest in any case in which he is either an arresting or investigating officer. (1964, 1st Ex. Sess., No. 100, § 16, appvd. Aug. 24, 1964.)

§ *1601(145). Authority of other officials to issue warrants not affected by this subdivision.*—Nothing contained in this subdivision shall be so construed as to limit, restrict or repeal any authority, right or power of any recorder or other official of the city to issue search warrants or warrants of arrest. (1964, 1st Ex. Sess., No. 100, § 17, appvd. Aug. 24, 1964.)